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ABSTRACT

This pamphlet is a complete revision of the ACLU's handbook on academic freedom and civil liberties for students in institutions for higher learning, first published in 1961. Section I deals with the student as a member of the academic community, including admission policies, freedom in the classroom, safeguarding the privileged student-teacher relationship, the student's role in the formulation of academic policy and the ethics of academic scholarship. Section II deals with extracurricular activities, including student government, student clubs and societies, student-sponsored forums, student publications, radio and television, and artistic presentations. Section III discusses student's political freedom on and off campus. Section IV discusses personal freedom in terms of student residences, personal appearance, pregnancy, and search and seizure. Section V deals with regulations and disciplinary procedures, including enacting and promulgating regulations, academic due process, double penalties, and law enforcement on campus. Section VI discusses students and the military, including extent of cooperation with the Selective Service System, unconstitutional reclassification, recruitment on campus, and ROTC. Section VII deals with the confidentiality of student records. Recent court decisions on student rights and constitutional amendments relevant to standards of academic freedom are included in the appendix. (AF)

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ACADEMIC FREEDOM AND CIVIL LIBERTIES OF STUDENTS IN COLLEGES AND UNIVERSITIES

APRIL, 1970

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
OFFICE OF EDUCATION

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Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

Keyishian *v.* Board of Regents, *385 U.S. 589, 603 (1967).*

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PREFACE

This pamphlet is a complete revision of the American Civil Liberties Union's handbook on academic freedom and civil liberties for students in institutions of higher learning, first published in 1961.

Given the diversity of colleges and universities — public and private, secular and religious, differing traditions, size and aims — no set of formulas or prescriptions will fit all situations and problems. The guidelines in this pamphlet, developed in consultation with educators throughout the country, are offered, therefore, as advice on ways in which institutions of higher learning, private as well as public, may operate with due regard for the rights of students. In some instances, they go beyond legal requirements established by the law. In view of the rapidity with which new issues are arising and different standards evolving, some of our recommendations may call for revision in the course of time.

We believe that academic freedom for students encompasses rights to study, discuss and question evidence and opinion supporting or critical of accepted beliefs, to hear speakers on all points of view, to express opinions through all media without censorship, and to organize to exercise these rights. In a wider sense, academic freedom is analogous to civil liberties in the community at large, including not only the right to free inquiry, expression and dissent, but the right to due process and equal treatment, assuring for

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teachers and students the full enjoyment of their constitutional liberties.

The Union has long sought to gain for students a recognition of rights that, until recently, were held to apply to teachers only. In 1941, the ACLU published a survey entitled, "What Freedom for American Students?," describing the restraints on students' activities and freedom of expression imposed on the nation's campuses. A subsequent statement, "Civil Liberties of Teachers and Students — Academic Freedom" (1949), equated certain basic students' rights with faculty rights, emphasizing that the freedom to learn is as vital to the educational process as the freedom to teach.

As long-time guardian of civil liberties, the ACLU uses its resources — those of the national office and of its many affiliates and chapters throughout the country — to offer advice and assistance when, in its judgment, academic freedom has been infringed upon or denied to students. The Union does not work exclusively through the courts. In cases involving academic freedom, the ACLU prefers direct negotiation, supplemented, when deemed desirable, by publicity and the assistance of other interested organizations.

Other current ACLU publications on academic freedom are: "Academic Freedom, Academic Responsibility, Academic Due Process in Institutions of Higher Learning: A Statement of Principles Concerning the Civil Liberties and Obligations of Teachers and Desirable Procedures Involving Academic Freedom in Public and Private Colleges and Universities" (1966); and "Academic Freedom in the Secondary Schools" (1968).

INTRODUCTION

The past several years have been marked by great tension. Unrest among college students, involving confrontations and bordering in some cases on rebellion, has swept from one American campus to another. Students have asserted the right to participate in decision-making in matters relating to student life and discipline, to the formulation of academic policies, and the governance of their institutions. Many have also strongly opposed what they consider the distortion or perversion of the university's proper purposes in serving ends established by agencies other than the academic community. They have condemned, *inter alia,* the university's ties to military agencies, secret research, the status on campus of the Reserve Officers Training Corps, recruitment for the military or defense industries, and the failure adequately to enroll and educate black and other disadvantaged Americans. As we enter a new decade there is little reason to think that these concerns will abate.

The American Civil Liberties Union and its Academic Freedom Committee recognize that many of the protesters, who include not only undergraduate and graduate students but some (particularly

younger) faculty members, are moved by deep conviction and urgent concern in the attempt to correct what they deem educational inequities and, beyond that, to eliminate or mitigate the social, economic and political injustices of our society. Whatever differences of opinion exist with respect to and on how best to serve these causes, the ACLU is convinced that methods of protest which violate and subvert the basic principles of freedom of expression and academic freedom are abhorrent and must be condemned.

We believe in the right, and are committed to the protection of, all peaceful forms of protest, including mass demonstrations, picketing, rallies and other dramatic forms. But actions which deprive others of the opportunity to speak or be heard, involve takeovers of buildings that disrupt the educational process, incarceration of or assaults on persons, destruction of property and rifling of files, are anti-civil libertarian and incompatible with the nature and functions of educational institutions.

Fundamental to the very nature of a free society is the conviction expressed by Mr. Justice Holmes that "the best truth is the power of the thought to get itself accepted in the competition of the market." When men govern themselves they have a right to decide for themselves which views and proposals are sound and which unsound. This means that all points of view are entitled to be expressed and heard. This is particularly true in universities

which render great services to society when they function as centers of free, uncoerced, independent and creative thought and experience. Universities have existed and can exist without bricks and mortar but they cannot function without freedom of inquiry and expression.

For these reasons, the American Civil Liberties Union has from its very inception defended free expression for all groups and all points of view, including the most radical and the most unpopular within the society and the university. To abandon the democratic process in the interest of "good" causes, without a willingness to pay the penalty for civil disobedience, is to risk the destruction of freedom not just for the present but for the future, not just for our social order but for any future social order as well. Freedom, the world has learned to its sorrow, is a fragile plant that must be protected and cultivated.

It should be axiomatic that if the college or university* is to survive as a free institution without recourse to the law-enforcement authorities, without interposition by the courts or interference from legislators, it must strive to create its own workable,

In this pamphlet, the words "college" and "university" are used interchangeably to refer to all institutions of higher education.

forward-looking, self-governing society. In addition, as Calvin H. Plimpton, President of Amherst College, wrote in a letter addressed to President Nixon, on May 2, 1969, in behalf of the entire Amherst college community, recognition must be given to the fact that part of the turmoil in universities "derives from the distance separating the American dream from the American reality."

It is obvious that our universities and colleges do not have the power to redress the ills of our society. But the more forward-looking are re-examining their structure and policies to preserve and extend the freedom and autonomy of the university community. In this connection, the ACLU has already endorsed measures which would enhance the role of faculty and students in the governing of academic institutions, which set standards for the Reserve Officers Training Corps programs to operate on campus in harmony with principles of academic freedom, and which call for continuing scrutiny of curricula and extracurricula programs. (The ACLU has also taken the position that the present draft system is unconstitutional and violates civil liberties guarantees.)

In this time of challenge and change, the Union trusts that the guidelines set forth in this revised edition of "Academic Freedom and Civil Liberties of Students in Colleges and Universities" will serve as a basis for discussion and decision for all members of the academic community.

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I. The Student As a Member of the Academic Community

The student's freedom to learn is a complement of the faculty member's freedom to teach. An academic community dedicated to its ideals will safeguard the one as vigorously as it does the other.

A. Admission Policies

Admission to college should not be granted or denied on the basis of ethnic origin, race, religion, or political belief or affiliation. In order to achieve genuine equality of educational opportunity, colleges may, in respect to persons previously denied opportunity for equal educational advantage, properly apply standards and methods of evaluating applications different from those used with other applicants, as long as these standards and methods are reasonably designed to increase equality of educational opportunity. Massive compensatory programs for educationally deprived students should be simultaneously instituted.

B. Freedom in the Classroom

Free and open discussion, speculation and investigation are basic to academic freedom. Students as well as teachers should be free to present their own opinions and findings. Teachers should evaluate student performance with scrupulous adherence to professional standards and without prejudice to the expression of views that may be controversial or unorthodox.

C. Safeguarding the Privileged Student-Teacher Relationship

The essential safeguard of academic freedom is mutual trust and the realization by both student and teacher that their freedom is reciprocal. Any abrogation of or restriction on the academic freedom of the one will, inevitably, adversely affect the other.

1. *Inquiries by Outside Agencies.* Because the student-teacher relationship is a privileged one, the student does not expect that the

views he expresses, either orally or in writing, and either in or outside the classroom, will be reported by his professors beyond the walls of the college community. If he anticipated that anything he said or wrote might be disclosed, he might not feel free to express his thoughts and ideas and the critical inquiry, probing and investigation essential to a free academy might well be impaired.

The following standards are recommended as general guidelines: when questioned directly by representatives of government agencies or by prospective employers of any kind, public or private, or by investigative agencies or other persons, or indirectly by the institution's administrative officers in behalf of such agencies, a teacher may safely answer questions which he finds clearly concerned with the student's competence and fitness for the job. There is always the chance, however, that even questions of this kind will inadvertently cause the teacher to violate academic privacy. Questions and answers in written form make it easier to avoid pitfalls, but the teacher's alertness is always essential. Ordinarily, questions relating to the student's academic performance as, for example, the ability to write clearly, to solve problems, to reason well, to direct projects—pose no threat to educational privacy. But questions relating to the student's loyalty and patriotism, his political, religious, moral or social beliefs and attitudes, his general outlook, his private life may, if answered, violate the student's academic freedom and jeopardize the student-teacher relationship.

As a safeguard against the danger of placing the student in an unfavorable light with government agencies or employers of any category, teachers may preface each questionnaire with a brief *pro forma* statement that the academic policy to which they subscribe makes it inadvisable to answer certain types of questions about any or all students. Once this academic policy becomes widespread, presumptive inferences about individual students will no longer be made by employers.

Even when the student requests his teacher to disclose information other than relating to his academic performance because he thinks it would be to his advantage, such disclosure should not be made since disclosure in individual cases would raise doubts about students who had made no such request. A satisfactory principle, therefore, would foreclose disclosure in all cases.

Faculty senates or other representative faculty bodies, it is hoped, will take cognizance of the teacher-disclosure problem, recommend action which will leave inviolate the teacher-student

relationship, and protect the privacy of the student. (See VII., "Confidentiality of Student Records.")

2. *Use of Electronic Recording Devices.* Television cameras, tape recorders and similar devices are being used with increasing frequency for educational purposes in colleges and universities. The use of such equipment in classrooms, in an ethical manner and for legitimate educational purposes, is not to be criticized. Caution must be exercised, however, to prevent the misuse of sight and sound recordings where they are likely to inhibit free and open discussion by teacher and student. Students who wish to use tape recorders for the purpose of recording class lectures and/or discussions should do so only with the explicit knowledge and consent of the teacher and participants, and then only for that purpose. A faculty-student committee should establish guidelines for the use of electronic recording devices and for the disposition of records which are made.

D. The Student's Role in the Formulation of Academic Policy

Colleges and universities should take whatever steps are necessary to enable student representatives to participate in an effective capacity with the faculty and administration in determining at every level, beginning with the departmental, such basic educational policies as course offerings and curriculum; the manner of grading; class size; standards for evaluating the performance of faculty members; and the relative allocation of the institution's resources among its various educational programs. Determination of what constitutes participation in an effective capacity in specific areas of decision-making may be assessed by individual institutions in accordance with reasonable standards. Student participation in some areas may be solely advisory, while in other areas, a voting role would be appropriate.

E. The Ethics of Scholarship

So that students may become fully aware of the ethics of scholarship, the faculty should draw up a clear statement as to what constitutes plagiarism, setting forth principles the students will understand and respect. This should be made available to students. Any student charged with such a violation should be accorded a due process hearing as outlined in Chapter V.

II. Extracurricular Activities

Students receive their college education not only in the classroom but also in out-of-class activities which they themselves organize through their association with fellow students, the student press, student organizations and in other ways. It is vital, therefore, that their freedom as campus citizens be respected and ensured.

A. Student Government

Student government in the past has had as one of its chief functions the regulation of student-sponsored activities, organizations, publications, etc. In exercising this function, no student government should be permitted to allocate resources so as to bar or intimidate any campus organization or publication nor make regulations which violate basic principles of academic freedom and civil liberties.

1. *Election Procedures.* Delegates to the student government should be elected by democratic process by the student body and should not represent merely clubs or organizations. Designation of officers, committees, and boards should also be by democratic process, should be non-discriminatory, and should not be subject either to administrative or faculty approval. Any enrolled student should be eligible for election to student office. In universities, graduate students should be afforded the opportunity to participate in student government.

2. *Funding.* Operational funds should be supplied by the students themselves or the college administration. No student government, nor its national affiliate, should be covertly subsidized by any governmental agency.

B. Student Clubs and Societies

1. *The Right to Organize.* Students should be free, without restraint by either the college administration or the student government, to organize and join campus clubs or associations for educational, political, social, religious or cultural purposes. No such organization should discriminate on grounds of race, religion, color

or national origin. The administration should not discriminate against a student because of membership in any campus organization.

The guidelines in this section apply to student organizations that seek official university recognition, subsidy, or free use of university facilities. They do not necessarily apply to off-campus organizations or those which do not have these privileges. (See Section III. B., Students' Political Freedom Off-Campus.)

2. *Registration and Disclosure.* A procedure for official recognition of student organizations may be established by the student government. The group applying for recognition may be required only to submit the names of its officers and, if considered advisable, an affidavit that the organization is composed of students and stating their number if related to funding. The names of officers should not be disclosed without the consent of the individuals involved. The fact of affiliation with any extramural association should not, in itself, bar a group from recognition, but disclosure of such fact may be required.

3. *Use of Campus Facilities.* Meeting rooms and other campus facilities should be made available to student organizations on a non-discriminatory basis as far as their primary use for educational purposes permits. Bulletin boards should be provided for the use of student organizations; school-wide circulation of all notices and leaflets should be permitted.

4. *Advisers for Organizations.* No student organization should be required to have a faculty adviser, but if it wishes one, it should be free to choose one for itself. An adviser should consult with and counsel the organization but should have no authority or responsibility to regulate or control its activities.

C. Student-Sponsored Forums

Students should have the right to assemble, to select speakers and guests, and to discuss issues of their choice. It should be clear to the public that an invitation to a speaker does not imply approval of the speaker's views by either the student group or the college administration. Students should enjoy the same right as other citizens to hear different points of view and draw their own conclusions. When a student group wishes to hear a controversial or socially unpopular speaker, the college should not require that a

spokesman for an opposing viewpoint be scheduled either simultaneously or on a subsequent occasion.

D. Student Publications

All student publications—college newspapers, literary and humor magazines, academic periodicals and yearbooks—should enjoy full freedom of the press, and not be restricted by either the administration or the student government. This should be the practice even though most college publications, except for the relatively few university dailies which are financially autonomous, are dependent on the administration's favor for the use of campus facilities, and are subsidized either directly or indirectly by a tax on student funds. Student initiation of competing publications should not be discouraged.

College newspapers—and so far as appropriate, all student publications—whether or not supported from student fees or other resources of the college, should impartially cover news and should serve as a forum for opposing views on controversial issues as do public newspapers. They may also be expected to deal in news columns and editorials with the political and social issues that are relevant to the concerns of the students as citizens of the larger community. Neither the faculty, administration, board of trustees nor legislature should be immune from criticism.

Wherever possible a student newspaper should be financially and physically separate from the college, existing as a legally independent corporation. The college would then be absolved from legal liability for the publication and bear no direct responsibility to the community for the views expressed. In those cases where college papers do not enjoy financial independence, no representative of the college should exercise veto power in the absence of a specific finding of potential libel as determined by an impartial legal authority. In no case, however, should the decision of the editor or editors be challenged or overruled simply because of pressure from alumni, the board of trustees, the state legislature, the college administration or the student government.

Where there is a college publications board, it should be composed of at least a majority of students selected by the student government or council, or by some other democratic method. Should the board, or in case the paper has no board, an *ad hoc* committee selected by the faculty and student government,

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maintain that the editor has been guilty of deliberate malice or deliberate distortion, the validity of this charge should be determined through due process.

E. Radio and Television

Campus radio and television stations should enjoy and exercise the same editorial freedom as the college press. Stations whose signals go beyond the campus operate under a license granted by the Federal Communications Commission and, therefore, must conform to the applicable regulations of the Commission.

F. Artistic Presentations

The same freedom from censorship enjoyed by other communications media should be extended to on-campus artistic presentations.

III. Students' Political Freedom

American college students possess the same right to freedom of speech, assembly and association as do other residents of the United States. They are also subject to the same obligations and responsibilities as persons who are not members of the academic communities.

A. On-Campus

Students should be free through organized action on campus to register their political views or their disapprobation of university policies, but within peaceful limits. The use of force on a college campus—whether by students, the campus police, or outside police called in by the administration — is always to be regretted. Outside police should not be summoned to a campus to deal with internal problems unless essential and unless all other techniques have clearly failed. (See V.D., Law Enforcement on the Campus.)

Failure of communication among administration, faculty and students has been a recurrent cause of campus crises. Prompt

consultation by the administration with faculty and student spokesmen may serve to prevent potentially disastrous confrontations which disrupt the orderly processes of the institution.

1. *Ground Rules.* Picketing, demonstrations, sit-ins, or student strikes, provided they are conducted in an orderly and non-obstructive manner, are a legitimate mode of expression, whether politically motivated or directed against the college administration, and should not be prohibited. Demonstrators, however, have no right to deprive others of the opportunity to speak or be heard; take hostages; physically obstruct the movement of others; or otherwise disrupt the educational or institutional processes in a way that interferes with the safety or freedom of others.

Students should be free, and no special permission be required, to distribute pamphlets or collect names for petitions concerned with campus or off-campus issues.

2. *Tripartite Regulations.* Regulations governing demonstrations should be made by a committee of administrators, representative faculty, and democratically selected students. The regulations should be drawn so as to protect the students' First Amendment rights to the fullest extent possible and, at the same time, ensure against disruption of the academic process as, for example, by the use of high volume loudspeakers or other techniques which curtail the freedom of others.

B. Off-Campus

Student participation in off-campus activities such as peace marches, civil rights demonstrations, draft protests, picketing, boycotts, political campaigns, public rallies, non-campus publications and acts of civil disobedience is not the legitimate concern of the college or university. (See V.C., "Double Penalties")

Students, like teachers, have the right to identify themselves as members of a particular academic community. But they also have the moral obligation not to misrepresent the views of others in their academic community.

IV. Personal Freedom

College students should be free to organize their personal lives and determine their private behavior free from institutional interference. In the past many colleges, with the approval of parents and the acquiescence of students, have played the role of surrogate parents. This function is now being strongly challenged. An increasing number of institutions today recognize that students, as part of the maturing process, must be permitted to assume responsibility for their private lives — even if, in some instances, their philosophies or conduct are at variance with traditional standards.

The college community should not regard itself as the arbiter of personal behavior or morals, as long as the conduct does not interfere with the rights of others. Regulation is appropriate only if necessary to protect the health, safety, and academic pursuits of members of the academic community.

Some Specific Areas of Personal Behavior:

1. *Student Residences.* Although on-campus living is often regarded as an important part of the total educational experience, it should not be made compulsory.

2. *Personal Appearance.* Dress and grooming are modes of personal expression and taste which should be left to the individual except for reasonable requirements related to health and safety, and except for ceremonial occasions the nature of which requires particular dress or grooming.

3. *Pregnancy.* If a student is pregnant she should be free to decide, in consultation with her physician or with college health authorities, when to take leave of her studies.

4. *Search and Seizure.* A student's locker should not be opened, nor his room searched, without his consent except in conformity with the spirit of the Fourth Amendment which requires that a warrant first be obtained on a showing of probable cause, supported by oath or affirmation, and particularly describing the things to be seized.

V. Regulations and Disciplinary Procedures

Regulations governing student conduct should be in harmony with and essential to the fulfillment of the college's educational objectives. Students should participate fully and effectively in formulating and adjudicating college regulations governing student conduct. Reasonable procedures should be established and followed in enforcing discipline.

A. Enacting and Promulgating Regulations

1. Regulations should be clear and unambiguous. Phrases such as "conduct unbecoming a student," or "actions against the best interests of the college," should be avoided because they allow too much latitude for interpretation.

2. The range of penalties for the violation of regulations should be clearly specified.

3. Regulations should be published and circulated to the entire academic community.

B. Academic Due Process

1. Minor infractions of college regulations, penalized by small fines or reprimands which do not become part of a student's permanent record, may be handled summarily by the appropriate administrative, faculty or student officer. However, the student should have the right to appeal.

2. In the case of infractions of college regulations which may lead to more serious penalties, such as suspension, expulsion, or notation on a student's permanent record, the student is entitled to formal procedures in order to prevent a miscarriage of justice.[1]

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[1] *A student may be suspended only in exceptional circumstances involving danger to health, safety or disruption of the educational process. Within twenty-four hours of suspension, or whenever possible prior to such action, the student should be given a written statement explaining why the suspension could not await a hearing.*

These procedures should include a formal hearing by a student-faculty or a student judicial committee. No member of the hearing committee who is involved in the particular case should sit in judgment.

Prior to the hearing the student should be:
a. advised in writing of the charges against him, including a summary of the evidence upon which the charges are based.
b. advised that he is entitled to be represented and advised at all times during the course of the proceedings by a person of his own choosing, including outside counsel.
c. advised of the procedures to be followed at the hearing.

At the hearing, the student (or his representative) and the member of the academic community bringing charges (or his representative) should each have the right to testify, although the student should not be compelled to do so, and each should have the right to examine and cross-examine witnesses and to present documentary and other evidence in support of respective contentions. The college administration should make available to the student such authority as it may possess to require the presence of witnesses and the production of documents at the hearing. A full record should be taken at the hearing and it should be made available in identical form to the hearing panel, the administration and the student. After the hearing is closed, the panel should adjudicate the matter before it with reasonable promptness and submit its finding and conclusions in writing. Copies thereof should be made available in identical form, and at the same time, to the administration and the student. The cost should be met by the institution.

3. After completion of summary or formal proceedings, the right of appeal should be permitted only to the student. On appeal, the decision of the hearing Board should be affirmed, modified or reversed but the penalty, if any, not increased.

C. Double Penalties

Respect for the presumption of innocence requires that a college not impose academic sanctions for the sole reason that a student is or has been involved in criminal proceedings.

A student charged with or convicted of a crime should not be subject to academic sanctions by the college for the same conduct

unless the offense is of such a nature that the institution needs to impose its own sanction upon the student for the protection of other students or to safeguard the academic process. Where there is a possibility that testimony and other evidence at a college hearing would be subject to disclosure by way of subpoena in a subsequent court proceeding, college disciplinary hearings should be postponed to safeguard the student's right to a fair determination in the criminal proceeding.

Colleges should be especially scrupulous to avoid further sanctions attendant upon criminal convictions:

a. for conduct that should have been entitled to the protection of the First Amendment even if the student's First Amendment claim was not recognized by the Court which convicted him: for example, draft card burning.

b. for conduct which, while validly punishable, was a peaceable act of social, political or religious protest that did not threaten the academic process: for example, a trespass or breach of the peace.

c. for refusal to accept military service. (Students who have chosen imprisonment as an alternative to military service should be eligible on release for readmission to a college or university without prejudice to opportunities for financial aid.)

D. Law Enforcement on the Campus

Police presence on the campus is detrimental to the educational mission of the university and should be avoided if at all possible. In those last-resort situations, where all efforts to resolve campus disorders internally have failed, the institution may have to invite police to the campus to maintain or restore public order.

Guidelines and procedures for summoning off-campus law enforcement authorities should be established by a committee representing the administration, faculty and students. This committee should also determine the duties and prerogatives of campus security officers.

The proper function of law officers in crime detection cannot be impeded. Members of the academic community, however, should not function surreptitiously on campus as agents for law enforcement authorities. Such action is harmful to the climate of free association essential to a college community.

VI. Students and the Military

Colleges have an educational function to perform and should not become an adjunct of the military. Such a development would constitute a threat to their survival as centers of critical inquiry.

A. Extent of Cooperation with the Selective Service System

Information concerning the student's enrollment and standing should be submitted to Selective Service by the college only at the request of the student.[2]

B. Unconstitutional Reclassification

Draft boards should be considered to have violated the First Amendment when they cancel the deferment of students because they have participated in anti-war demonstrations.[3]

C. Recruitment on Campus

Unless a college bars all occupational recruitment of students, the Army, Navy and Air Force should be allowed the same campus facilities as other government agencies and private corporations.[4]

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[2]*In a letter to the ACLU, dated December 2, 1968, Deputy Director of Selective Service, Daniel O. Omer, stated: "The responsibility for keeping a selective service board informed regarding the current student status of a registrant is upon the registrant himself and not upon the college."*

[3]*The ACLU has protested as unconstitutional the recommendation to draft boards from Selective Service Director General Lewis B. Hershey, on October 26, 1967, that any student adjudged to have interfered "illegally" with draft processes or military recruitment be deprived of his deferment and reclassified on the ground that his action was not "in the national interest." In a case brought by the ACLU* (Gutknecht v. U.S., *38 U.S. L.W. 4075 Jan., 1969*), *the Supreme Court ruled that draft boards do not have legal power to accelerate the induction of young men because they turn in their draft cards or otherwise violate the Selective Service Act.*

[4]*Since on-campus recruitment is essentially a service to students and not central to the educational purposes of the university, colleges may prohibit all recruitment as a matter of institutional policy.*

D. ROTC[5]

On campuses where Reserve Officer Training Corps programs exist, student enrollment should be on a voluntary basis. Academic credit should be granted only for those ROTC courses which are acceptable to and under the control of the regular faculty. ROTC instructors should not hold academic rank unless they are members of an academic department subject to the regular procedures of appointment and removal. All ROTC programs should fully observe ACLU policies regarding the maintenance of records which relate or refer to social, religious, or political views or associations of the student, as set forth in this pamphlet. (See VII. Confidentiality of Student Records.)

VII. Confidentiality of Student Records[6]

1. No record, including that of conviction in a court of law, should be noted in a student's file unless there is a demonstrable need for it which is reasonably related to the basic purposes and necessities

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[4]*Continued*
But if outside recruitment is allowed, the ACLU believes it should be on a non-discriminatory basis and in accordance with established policies and procedures. Selective exclusions, arising primarily from a political controversy, that deny students access to particular recruiters are discriminatory in their applications and suggest a possible infringement of the spirit of the equal protection clause of the Constitution.

[5]*Without taking a position on the question of whether ROTC programs should exist on college campuses, the ACLU has concluded that such programs should comply with the standards stated above. Programs that fail to meet these standards threaten to undermine the value of free inquiry and academic autonomy which are at the heart of academic freedom and should, therefore, be eliminated in institutions of higher learning.*

[6]*The guidelines recommended for teachers in responding to inquiries by outside agencies are also applicable to this section. (See Section I.-C., 1.)*

of the university.[7] Relevant records, such as academic, disciplinary, medical and psychiatric, should be maintained in separate files.

2. No mention should be made in any university record of a student's religious or political beliefs or association.

3. Access to student records should be confined to authorized university personnel who require access in connection with the performance of their duties. All persons having access to student records should be instructed that the information contained therein must be kept confidential, and should be required to sign and date their adherence to this procedure.

4. Particular safeguards should be established with respect to medical (including psychiatric) records. Such records should be subject to the same rules of confidentiality as apply for non-students and should not be construed to be 'student records' for purposes of this section.

5. Persons outside the university could not have access to student academic records without the student's written permission, or to any other records, except in response to a constitutionally valid subpoena.[8]

6. The rules regarding the keeping and release of records should be made known and available to the university community.

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[7] *In October, 1966, the United States Civil Service Commission dropped all inquiries concerning arrest from its federal employment application forms, stating that such queries "infringed the spirit of due process and was particularly hurtful to those citizens who were arrested not for committing ordinary crimes, but as reprisal for exercising First Amendment rights of speech and association in civil right demonstrations."*

[8] *The term "constitutionally valid subpoena" is used to exclude subpoenas based on political investigation or other situations which, in the opinion of the Union, are unconstitutional.*

For example, in August 1966, the then U.S. House Committee on Un-American activities subpoenaed from the University of Michigan, the University of California at Berkeley, and Stanford University, copies of certification or statements of membership filed with the university by campus political organizations known to be critical of America's involvement in the war in Vietnam. The ACLU sent a letter to over 1,000 university and college presidents protesting this action by HUAC as one of the most serious breaches of academic freedom

[8]*Continued*

in recent decades and called upon institutions to resist, in every possible legal manner, such subpoenas if extended to other universities and colleges.

In a statement released July, 1967, the American Council on Education, referring to the HUAC subpoenas, said: "It is . . . in the interests of the entire academic community to protect vigilantly its traditions of free debate and investigation by safeguarding students and their records from pressure that may curtail their liberties . . . Colleges and universities should discontinue the maintenance of membership lists of student organizations, especially those related to matters of political belief or action. If rosters of this kind do not exist, they cannot be subpoenaed, and the institution is therefore freed of some major elements of conflict and from the risks of contempt proceedings or a suit."

This issue is of continuing concern in light of the subpoenas issued in May, 1969, by the Senate Permanent Subcommittee on Investigations to several institutions (including Harvard, Columbia, Cornell, Stanford and Boston Universities; the University of California at Berkeley, Brooklyn College, and City College of the City University of New York) for information on persons and groups allegedly involved in campus disorders.

APPENDIX A

Recent Court Decisions on Student Rights

This appendix briefly reviews some recent court decisions in cases involving civil liberties and academic freedom claims by students. Many of the principles of academic freedom and civil liberties of students have not yet gained legal recognition. Like civil liberties generally, their efficacy within our society depends in large part upon the general understanding and acceptance of the academic community and the community at large. Such community acceptance and court recognition, we may expect, will continue to be a process of interaction. Recent cases recognizing various rights of students bear witness to that interaction, but also make it more difficult to predict future decisions.[1]

Some issues involving academic freedom have never been tested in the courts. In still other areas, decisions handed down in the past are being challenged as invalid today. Concurrently, new constitutional doctrines have recently emerged which have yet to be applied in the area of student rights. (Most notable of these are doctrines bearing on the constitutional rights of accused minors as expounded in the *Gault* case;[2] the "unconstitutional conditions" doctrine which declares that the conferring of a privilege may not be conditioned upon withholding constitutional rights; and the "state action" concept which binds "private" entities, in this case private schools, to the due process and equal protection requirements if they serve a public function or receive significant governmental support.)

The reader should bear in mind that the decisions noted here are highly selective and not comprehensive. They have been compiled for the lay student to provide an indication of judicial trends.

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[1]*Most of the decisions affecting the legal relationships between students and institutions of learning have been based on the First and Fourteenth Amendments. (See Appendix B.)*

[2]In re Gault, *387 U.S. 1. (1967).* [*Extending the specific Bill of Rights guarantees to juveniles charged with delinquency in state courts, the Supreme Court said: "Neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."*]

Reliance on them in particular instances without consulting an attorney must be discouraged. For fuller exposition the reader is referred to the sources noted below.[3]

A. Due Process

1. *Procedural Due Process.* The concept of substantive student rights would be meaningless if university officials could, at their pleasure, ignore them and impose arbitrary penalties for behavioral infractions. Thus, a series of recent court decisions has begun to establish the student's legal right to procedural due process in disciplinary proceedings that may lead to suspension or expulsion from a state college or university.

In 1961, the U.S. Court of Appeals for the Fifth Circuit decided the leading case of *Dixon* v. *Alabama State Board of Education.*[4] The plantiffs were six students at the all-Negro Alabama State College in Montgomery who had been expelled summarily, without charges and without a hearing, after participating in a sit-in at a segregated lunch counter. "The question presented," the court said, "is whether due process requires notice and some opportunity for a hearing before students at a tax-supported college are expelled for misconduct. We answer that question in the affirmative." Stressing the importance of education to the individual and rejecting the idea that attendance at a state university is a privilege rather than a right, the court ruled that "the State cannot condition the granting of even a privilege upon the renunciation [in a written waiver signed upon admission] of the constitutional right of procedural due process." The court further specified that due process included "a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education."

The court did not say that a "full-dress hearing, with the right to cross-examine witnesses" was required, but ordered the school to conduct the "rudiments of adversary proceedings.... [T]he student

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[3] *Moneypenny, "Toward A Standard for Student Academic Freedom," 28* Law and Comtemp. Problems, *625 (1963); Van Alstyne, "Student Academic Freedom and Rule-Making Powers of Public Universities," 2* Law in Transition *Q.1 (1965); O'Neill, "Reflections on the Academic Senate Resolution," 54* Calif. L. Rev. *88 (1966); Heyman, "Some Thoughts on University Disciplinary Proceedings," 54* Calif. Law Review *73 (1966); "Developments in the Law—Academic Freedom," 81* Harv. L. Rev. *1045, March 1968.*

[4] *294 F. 2d 150 (5th Cir.)* cert. denied, *368 U.S. 930 (1961).*

should be given the names of witnesses against him and an oral or written report on the facts to which each witness testifies." He must also be given "the opportunity to present . . . his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf." Finally, "the results and findings of the hearing should be presented in a report open to the student's inspection," presumably to secure to him the right of effective judicial review, if sought.

A similar decision was reached in the case of *Knight* v. *State Board of Education*,[5] also in 1961. The plaintiffs, students at Tennessee A. & I. State University had been summarily dismissed after having been arrested for sitting in at public facilities during freedom rides. The federal district court held that whether the interest involved be described as a right or a privilege, the plaintiffs had the right of due process, including notice and hearing.

The courts are now spelling out the *Dixon* due process rule—determining just which procedural safeguards apply, and when. It seems that the extent of procedural rights required by courts will depend on the severity of the possible punishment, the nature of the substantive issue presented, and the actual fairness of the procedure adopted. It does not appear that any court has expressly disapproved *Dixon* or *Knight*; however, some federal district courts have merely paid lip service to their authority.[6]

Even the Fifth Circuit Court of Appeals—the same court which decided *Dixon*—has been hesitant about giving it breadth, holding in 1968 that students lost their right to a hearing simply by failing to furnish their current mailing address to the university.[7]

A federal district court in Alabama, however, decided in 1968 that a student accused of having marijuana in his room "was denied his right to procedural due process of law" and entitled to a new hearing when denied the right to confront and cross-examine witnesses and in the presumption of guilt which was raised by his refusal to testify on grounds of possible self-incrimination.[8]

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[5]*200 F. Supp. 174 (M.D. Tenn. 1961).*

[6]*See for example,* Due *v.* Florida A.&M. Univ., *233 F. Supp. 396 (N.D. Fla. 1963);* Jones *v.* Board of Ed., *279 F. Supp. 190 (M.D. Tenn. 1968), cert-denied;* Barker *v.* Hardway, *283 F. Supp. 228 (S.D. W. Va. 1968), aff'd 399 F. 2d 638 (4th Cir., 1968), pet. for cert. denied* 37 *U.S. L. Week* 3335 *(March 3, 1969).*

[7]Wright *v.* Texas Southern Univ., *392 F. 2nd 728 (5th Cir. 1968).*

[8]Moore *v.* Troy State Univ., *284 F. Supp. 725 (M.D. Ala. 1968).*

Possibly the most encouraging post-*Dixon* case (if not the most authoritative), was decided in 1967 by a federal district court in Missouri[9] which set forth what it viewed as the essential elements of student due process: 1) written charges; 2) 10 days' notice of hearing and charges; 3) hearing before the President (the finai authority); 4) student's right to advance inspection of the college's affidavits or exhibits; 5) student's right to counsel; 6) student's right to call witnesses, or introduce affidavits or exhibits; 7) right to confrontation and cross-examination of witnesses; 8) determination solely on evidence in the record; 9) written findings and disposition; 10) the right of either side to make a record at its expense. (The students, who had been suspended from Central Missouri State College allegedly for contributing to and participating in an unruly and unlawful demonstration, were accorded a hearing as prescribed by the court and the suspensions were reaffirmed.)

In 1968, a four-judge panel of the U.S. District Court for Western Missouri issued a set of guidelines on "judicial standards of procedure and substance in review of student discipline in tax-supported institutions of higher learning," which included the following due process requirements for severe disciplinary cases: adequate notice in writing of the charges and nature of the evidence; a hearing at which the student is given fair opportunity to present his position; and substantial supporting evidence for any disciplinary action taken. The court held that there is no general requirement that procedural due process provide for legal representation or other remaining features of federal criminal jurisprudence, except in rare and exceptional circumstances where necessary to guarantee the fundamental concepts of fair play.

In 1969, however, a federal district court in Louisiana held that in college disciplinary hearings involving severe penalties (suspension or expulsion), the student has a right to counsel as well as a right to examine the written record of a hearing board's findings.[10]

2. *Right to a Hearing Before Suspension.* Several recent court decisions have affirmed that students are entitled to a hearing before suspension.

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[9]Esteban *v.* Central Missouri State College, *277 F. Supp. 649 (W.D. Mo. 1967).*

[10]French *v.* Bashful, *303 F. Supp. 1333 (E.D. La., Sept., 1969).*

In a suit brought by a Mississippi Valley State College student, suspended for encouraging students to miss classes in order to attend a political meeting, the court did not rule on the merits of the case but addressed itself to the question of due process. The court held that the student could not be suspended prior to a "full and fair hearing."[11]

Students at Wisconsin State University at Oshkosh, suspended for destroying university property, were ordered reinstated by the court pending a fair hearing unless the university could show that such reinstatement posed a danger to the safety of other members of the academic community or to university property.[12]

A suit was brought by students at the University of Wisconsin at Madison who were suspended for 13 days by the Regents pending a full hearing on whether they should be suspended or expelled from the institution for alleged participation in violent disruptions. The students charged deprivation of the right to remain in attendance without due process of law. Because the Regents failed to prove that an earlier preliminary hearing was not possible, the Court ordered the students reinstated pending such a hearing.[13] (The University is appealing the decision.)

B. Substantative Judicial Review of Regulations

The courts have not been active in striking down substantive college and university regulations as unreasonable or overly vague, broad or discretionary. Rules of state educational institutions enjoy the same (and in practice greater) presumption of constitutionality as statutes, and will be upheld if reasonably related to a lawful purpose. The courts have granted wide latitude to these institutions to prescribe rules of conduct[14] and appearance. However, recent

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[11]Wilson *v.* White, *Civ. No. GC 6852-5 (N.D. Miss. Dec. 17, 1968).*

[12]Marzette *v.* McPhee, *294 F. Supp. 562 Civ. No. 680C-199 (W.D. Wis., Dec. 9, 1968).*

[13]Stricklin *v.* Regents of the Univ. of Wisconsin, *297 F. Supp. 416 (W.D. Wis., 1969); but see,* Furutani *v.* Ewigleben, *297 F. Supp. 1163 (N.D. Calif. 1969)* [*accepted suspensions imposed with no prior hearing*].

[14]*See, for example,* Steier *v.* N.Y. State Ed. Comm'r., *271 F. 2nd 13 (2d Cir. 1959)* cert. denied, *361 U.S. 966 (1960)* [*upheld expulsion for writing critical letters to President*]; Jones *v.* Bd. of Ed., *279 F. Supp. 190 (M.D. Tenn. 1968)* [*upheld expulsion for calling school officials "Uncle Toms" and passing out SNCC literature*].

decisions indicate that where no substantial college interest in discipline or the operation of the school is involved, regulations affecting conduct and appearance will be subject to closer scrutiny.

1. *Specificity.* The question of specificity in college regulations was recently reviewed in a case involving a group of University of Wisconsin students charged by the University with "misconduct" and violation of a regulation prohibiting the support of causes "by means which disrupt the operations of the university, or organizations accorded the use of university facilities." The students, who had forcibly blocked other students from job interviews with Dow Chemical Company recruiters, had challenged the right of the school to apply its "misconduct" prohibition in the absence of detailed rules spelling out offenses. Invalidating the charges, the Wisconsin district court held that a catchall "misconduct" rule which "serves as the sole standard violates the due process clause of the Fourteenth Amendment by reason of its vagueness or, in the alternative, violates the First Amendment as embodied in the Fourteenth by reason of its vagueness and overbreath."

The decision in this case was subsequently upheld by the U.S. Court of Appeals for the Seventh Circuit.[15] However, a conflicting opinion on the issue of specificity in college regulations was handed down by another federal court of appeals. In reviewing the case of *Esteban* v. *Central Missouri State College* (see A. 1., above), the Eighth Circuit upheld the student suspensions on the ground that broadly worded regulations, such as "conduct unbefitting a student" and "participation in mass gatherings which might be considered as unruly or unlawful," were adequate for purposes of college discipline. Based on the clear conflict between the two federal courts, a petition for review of *Esteban* has been filed with the Supreme Court.

2. *Personal Appearance.* In a number of cases involving regulations on appearance, federal and state courts have generally deferred to administrative decisions and upheld restrictions.[16] In 1966, the Supreme Court refused to review the case of a college student who was not permitted to register for his senior year because of his

[15]Soglin *v.* Kauffman, *295 F. Supp. 978 (W.D. Wis. 1968), aff'd.—No. 17427 (7th Cir., Oct. 24, 1969).*

[16]*See* Leonard *v.* School Com. of Attleboro, *212 N.E. 2d 460 (1966);* Ferrell *v.* Dallas Ind. Sch. Dist., *392 F. 2d 697 (5th Cir.),* cert. denied, *37 U.S. L.W. 3127 (1968).*

goatee and the length of his hair.[17] Since then the Court has also refused to review two cases which sought to establish the right of male high school students to wear their hair longer than prescribed by officials at their schools. Several recent lower court decisions, however, indicate that some courts are beginning to question the authority of school administrators in this area. The Madison, Wisconsin federal district court for example, in holding that high school students could not be expelled for refusing to conform to "hair" regulations imposed by the school authorities, noted that length of hair in itself did not present a health hazard nor cause disruption of school activities.[18] This decision has been upheld by the U.S. Court of Appeals which declared: "The right to wear one's hair at any length or in any desired manner is an ingredient of personal freedom protected by the United States Constitution." The State of Wisconsin has announced that it will appeal to the U.S. Supreme Court.

C. First Amendment Rights

Some recent decisions have provided judicial support for a free student press, students' right to engage in lawful demonstration, their right to hear outside speakers of their choosing, and their freedom of expression.

1. *Free Press.* First Amendment rights were successfully invoked in a recent case[19] involving censorship of the student press. Dickey, the editor of the student newspaper of Troy State College, Alabama, had been refused the customary quarterly "readmission" for printing the single word "censored" in place of an editorial critical of the state legislature which the college administration had ordered deleted. The federal district court declared: "State school officials cannot force a college student to forfeit his constitutionally protected right of freedom of expression as a condition for his

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[17]Marshall *v.* Oliver, *385 U.S. 945, 17 L. Ed. 2d 225 (1966)* cert. denied.

[18]Breen *v.* Kahl, *296 F. Supp. 702 (W.D. Wisc., 1969); see also* Zachry *v.* Brown, *229 F. Supp. 1360 (N.D. Alabama, 1967); and* Griffin *v.* Tatum, *300 F. Supp. 1360 (M.D. Alabama, 1969);* Robert Richards, Jr. *v.* Roger Thurston, *304 F. Supp. 449, (Mass. 1969);* Miller *v.* Gillis, *No. 60-C-1851 (N.D. Ill., Sept. 25, 1969); but see,* Crews *v.* Cloncs, *N. IP 69-C-405 (S.D. Ind., Sept. 17, 1969)* [*held that the wearing of long hair is not a constitutional right.*] *This case is being appealed.*

[19]Dickey *v.* Alabama State Board of Education, *273 F. Supp. (M.D. Ala., 1967).*

attending a state-supported institution." It ordered Dickey readmitted to the college. The court ruled that the limitation on free expression has been founded solely on the college's desire to restrain criticism, and that "the exercise of such right [of free expression] does not 'materially and substantially interfere with requirements of appropriate discipline in the operation of the school.' "

Editorial independence for student publications was also affirmed in a February, 1970 ruling by a U.S. district court in Boston that the state may not censor student newspapers at state-supported colleges.[20] The suit, brought by the editor-in-chief of the Fitchburg State College student newspaper, "The Cycle," stemmed from a dispute over the publication of an article by Eldridge Cleaver which the college president held to be obscene. After failing to prevent publication by cutting off the paper's funds, the president set up a two-man "advisory board" to review material submitted to the paper before publication. In finding these actions unconstitutional, the Court said: "Having fostered a campus newspaper, the state may not impose arbitrary restrictions on the matter to be communicated." Noting that the individual's right to free expression must yield when it is incompatible with the school's obligation to maintain order on campus, the Court declared: "Obscenity in a campus newspaper is not the type of occurrence apt to be significantly disruptive of an orderly and disciplined educational process. If anything the contrary would seem to be true."

In another major decision involving freedom of the student press, a federal court judge sustained the right of a group of high school students to publish a paid advertisement opposing the war in Vietnam in their school newspaper.[21] The ad, approved by the school publications board, was prohibited by the principal on the ground that the paper was not for the communication of ideas but for the use of those students who managed it; that the school paper was concerned primarily with school-related issues; and that the practice was to accept only commercial as opposed to political advertisements. In rejecting these arguments, the Judge upheld the right of students to express their views on "matters intimately related to them, through traditionally accepted nondisruptive modes of communication. . . ." He noted that perusal of the school

[20]Antonelli *v.* Hammond, *No. 69-1128-G (D. Mass. Feb. 5, 1970).*

[21]Zucker *v.* Panitz, *68 Civ. 1339 (S.D. N.Y. May 15, 1969).*

papers submitted to the court showed that "the newspaper is being used as a communications media regarding controversial topics and that the teaching of journalism includes dissemination of such ideas." He further held that to permit only commercial advertisements would be unconstitutional discrimination against non-mercantile messages, prohibited by the First Amendment.

2. *Student Speeches and Demonstrations.* It has become clear that state university campuses are to be treated like other public facilities with respect to speeches and demonstrations. Reasonable and neutrally applied rules may be established allocating facilities and regulating time, place and manner, and considering bona fide and substantial interests of the university in safety, administration, and its educational function.

Absolute bans on demonstrations without prior approval are constitutionally impermissible, except possibly in extreme situations of clear and imminent danger. In the recent *Hammond* case,[22] three students had been suspended from South Carolina State College under a regulation requiring prior administration approval of all campus demonstrations. The federal district court found the regulation void on its face as constituting "a prior restraint on the right to freedom of speech and the right to assemble." The right of students to demonstrate for redress of grievances was held to parallel the right of citizens to demonstrate at the site of their government.

In *Goldberg*,[23] however, a California state court ruled that students do not have an unlimited right to demonstrate on university property. The court found that a "Filthy Speech" rally at the University at Berkeley was loud and bawdy, and that the university could legitimately decide that discipline was necessary for the "maintenance of order and propriety."

Reconciliation of the *Hammond* and *Goldberg* decisions probably requires comparison of the respective regulations and conduct: in *Hammond,* the conduct was more purely protected speech and the rule was broadly prohibitory; in *Goldberg*, the conduct was highly offensive and the regulation seemingly reasonable.

3. *Freedom of Expression.* A landmark Supreme Court decision

[22]Hammond *v.* South Carolina State College, *272 F. Supp. 947 (D.S.C. 1967).*

[23]Goldberg *v.* Regents of Univ. of Calif., *57 Cal. Rptr., 463 (Dist. Ct. App. 1967).*

upholding the right of high school students to engage in peaceful, symbolic means of expression has broad implications for the college student's freedom of expression as well. In *Tinker* v. *Des Moines Independent School Board,*[24] the Court held for the first time that students in public elementary and secondary schools are beneficiaries of the First Amendment guarantee of free speech. The case involved three students who were suspended for wearing black armbands to school to dramatize their objections to the Vietnam war and their support for a truce. Noting that the wearing of the armbands, which it recognized as a form of "symbolic speech," was entirely divorced from actually or potentially disruptive conduct, the Court held that "in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." The Court made clear that the principal "constitutionally valid reason" it had in mind was disruption or interference with school activities.

Protected speech was further defined when Justice Fortas added his comments to the Supreme Court's refusal to review a lower court decision upholding the suspension of ten students from Bluefield State College in West Virginia.[25] During a demonstration against the administration at a football game, the students allegedly had disturbed the spectators and harassed the college president by using abusive language and rocking the car in which he was riding. Concurring in the decision to deny review, Justice Fortas stated: "The petitioners were suspended from college *not* for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others. . . . [T]he findings of the District Court, which were accepted by the Court of Appeals, establish that the petitioners here engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression, such as was involved in *Tinker* v. *Des Moines Independent Community School District*. . . . The Petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments."

The Supreme Court is being asked to review another case involving the application of the *Tinker* decision to a specific situation. Eight students at East Tennessee State University were

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[24]Tinker *v.* Des Moines Ind. Comm. Sch. Dist., *393 U.S. 503 (1969); See also* Burnside *v. Byars, 363 F. 2d 744 (5th Cir. 1966).*

[25]Barker *v.* Hardway, *37 U.S. L.W. 3250 (U.S. Jan., 1969). (Cert. denied, Mar. 10, 1969).*

suspended for distributing leaflets entitled, "Students are People Too."[26] In language alleged to be "malicious, false, seditious and inflammatory," the leaflets attacked the administration and called for major reforms in institutional practices and procedures. A majority of the federal court of appeals sustained the suspensions on the ground that both the dean and the president of the University definitely feared that continued distribution of the leaflets could "conceivably cause disruption." A dissenting opinion held that there had not been an evidentiary showing that the continued distribution of the leaflets would cause imminent disruption nor create material interference in the normal activities of the school.

4. *Outside Speakers.* It is highly doubtful whether any flat ban against outside speakers or any category of outside speakers, or any particular speaker, will survive a series of recent court rulings. Again, as with student speeches and demonstrations, the college may regulate and allocate the use of facilities by rules neutral as to political affiliation and content, and may require that speakers or host organizations bear reasonable responsibilities.

Some of the prohibitory statutes and rules held unconstitutional include the following:

—An Illinois statute prohibiting use of campus facilities by "any subversive, seditious, and un-American organization . . . for the purpose of carrying on, advertising or publicizing the activities of such organizations." A three-judge federal district court held "potential audience" had standing to sue; statute was unconstitutional on its face and as applied because of vagueness, as prior restraint on speech, and because of inadequate procedural safeguards.[27]

—A regulation promulgated by the trustees of the University of North Carolina providing "facilities . . . shall be denied to any visiting speaker who is known to be a member of any Communist Party, or is known to advocate the overthrow of the Constitution . . . or is known to have pleaded the Fifth Amendment. . . ." A three-judge federal district court found standing of speaker and audience to sue; the case was not moot because the date of the speech had passed and the regulation was wholly unconstitutional

[26]Norton, et al. *v.* Discipline Committee of East Tennessee University et al.—*F. 2d (6th Circ., Nov., 1969).*

[27]Snyder *v.* Bd. of Trustees, *286 F. Supp. 927 (N.D. Ill. 1968).*

for vagueness and imposing sanction on exercise of the Fifth Amendment.[28]

—A rule permitting uses of a city college auditorium "insofar as these are determined to be compatible with the aims of Hunter College as a public institution of higher learning." A New York court held the rule void for vagueness.[29]

Other decisions prohibiting speaker bans are noted below.[30]

D. Search and Seizure and Self-Incrimination

Questions have arisen in courts recently as to (1) whether a student's dormitory room may be searched without his consent (and without a warrant or probable cause) and whether evidence unlawfully seized may be used against him by his college;[31] and (2) whether a student may be forced to confess criminal guilt in a university proceeding, whether he must be warned of his right to silence, and whether he may be presumed guilty and subjected to punishment for assertion of his right.[32]

The few court decisions on the privileges against self-incrimination and unreasonable search and seizure have mostly been unfavorable to the students. However, three recent Supreme Court decisions imply that both privileges must be available to students.

The first is the *Gault* case[33] in which the Supreme Court determined that constitutional rights are generally as applicable to juveniles as they are to adults. With respect to self-incrimination, the Court asserted:

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[28]Dickson *v.* Sitterson, *280 F. Supp. 486 (M.D. N.C. 1968).*

[29]Buckley *v.* Meng, *230 N.Y.S. 2d 924 (Sup. Ct. 1962).*

[30]Stacy *v.* Williams, *Civ. No. WC 6725 (N.D. Miss., Jan. 20, 1969). (TRO issued July 7, 1967);* Student Liberal Federation *v.* Louisiana State University., *Civ. No. 86-300 (E.D. La., Feb. 13, 1968). (TRO issued Feb. 15, 1968);* Egan *v.* Moore, *245 N.Y.S. 2d 622 (App. Div. 1963); Aff'd, 14 N.Y. 2d 775 (1964);* Brooks *v.* Auburn University, *412 F. 2d 1171 (5th Cir., July 8, 1969);* Smith *v.* University of Tennessee, *300 F. Supp. 777 (E.D. Tenn., 1969).*

[31]Moore *v.* Troy State University, *284 F. Supp. 725 (M.D. Ala. 1968);* Donaldson *v.* Mercer—*Cal. App. 2nd—, —Cal. Rptr. —3 Civil 1918 (Dist. Ct. App., Feb. 6, 1969)* [*concluded that a student's locker may be searched by a school vice-principal at any time, without a warrant and without consent, and that contraband found in the locker can be used in proceedings to declare the student a ward of the juvenile court*].

[32]Moore supra; Buttny *v.* Smiley, *281 F. Supp. (D. Colo. 1968).*

[33]*See Note 2,* supra.

"The privilege can be claimed in *any proceeding*, be it criminal or civil, administrative or judicial, investigatory or adjudicatory . . . it protects *any disclosure* which the witness may reasonably apprehend *could be used* in a criminal prosecution or which could lead to other evidence that might be so used." [The emphasis is the Court's]

The second recent Supreme Court decision (a pair of cases decided together[34]) holds that disciplinary action by a state agency may not be exacted as the price for invoking the privilege against self-incrimination. Although the two cases concerned attorneys and policemen, commentators agree that the holding would be applicable to students.

The third recent decision[35] is the Supreme Court's vacating of a judgment by the highest New York appellate court holding that a principal could validly consent to the search of a student's private locker.[36] The Court's instructions on remand indicate that ordinary search and seizure law may be applied to a student's private facilities, but a divided New York Court of Appeals has refused to apply that interpretation and the case is on its way back to the Supreme Court.

In another case bearing on this issue, the Supreme Court of Kansas has held that a high school locker may be searched by the school principal at the request of the police and without a warrant having been obtained.[37] This decision is also being appealed to the U.S. Supreme Court.

E. "Private" Universities and "State Action"

All of the cases mentioned above involved state or city schools, colleges and universities. The Fourteenth Amendment due process and equal protection clauses, and the portions of the Bill of Rights incorporated in the due process clause, are binding only upon states and state instrumentalities, such as financed schools, not as such upon private entities. Although it would at first seem that

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[34]Spevack *v.* Klein, *385 U.S. 511 (1967);* Garrity *v.* New Jersey, *385 U.S. 493 (1967).*

[35]Overton *v.* New York, *37 U.S. L.W. 3157 (1968).*

[36]*20 N.Y. 2d 360 (1968).*

[37]Stein *v.* Kansas, *456 P. 2nd 1 (petition for cert. filed Sept., 1969) U.S. No. 1018, Misc.*

private colleges and universities are wholly free to treat students as they choose, one leading commentator[38] has noted that "this preliminary observation is substantially false. . . . The concept of 'state action' has so far expanded, and the presence of government has so far penetrated, that very few colleges are today wholly 'private' in the sense of being altogether immune to the Fourteenth Amendment and the Bill of Rights." Furthermore, another commentator[39] has pointed out that "the federal constitution is not the only, or even the principal, source of law. State courts have ample power both to require procedural fairness in dismissal proceedings and to limit or, if necessary, to invalidate regulations or by-laws of 'private institutions'. . . ."

Particularly in civil rights cases,[40] activities of "private" schools largely financed by state funds have been held to be unconstitutional "state action." However, Tulane University, even though *privately* financed, was held subject to the Fourteenth Amendment because of its state charter, tax exemption and three public officials who were nominal members of the governing board.[41]

The claim to due process for students in a "private" university has gained some further support from a case involving several students expelled from Howard University.[42] The plaintiffs had been expelled summarily after demonstrations and a boycott at the university. The federal district judge argued that Howard's status as a formally private university left it free from the restraints

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[38]*Van Alstyne, "The Judicial Trend Toward Student Academic Freedom," 20* Fla. L. Rev. *290, 291, (1968).*

[39]*Byse, "The University and Due Process: A Somewhat Different View," Delivered at the Fifty-fourth Annual Meeting of the American Association of University Professors, Washington, D.C., April 26, 1968; see also Goldman, "The University and the Liberty of Its Students—A Fiduciary Theory," 54* Ky. L.J. *643 (1966).*

[40]*See* Griffin *v.* County School Bd., *377 U.S. 218 (1964); see also* Evans *v.* Newton, *382 U.S. 296, 86 S. Ct. 486, 15 L. Ed. (2d) 373 (Ga., 1966).* [*In a case involving a segregated public park setting, the Court stated: "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."*]

[41]Guillory *v.* Tulane University, *203 F. Supp. 855 (E.D. La. 1962).*

[42]Greene *v.* Howard University, *271 F. Supp. 609 (D.C. 1967), Civ. No. 1949-67 (D.C. Cir. 1967) (order by Bazalon, Wright and Tamm, J.J., Sept. 8, 1967).*

applicable to public colleges under the *Dixon* decision.[43] The students appealed, however, to the Court of Appeals for the District of Columbia, noting certain public characteristics of the university, including substantial government funding. Finding the students' argument to raise a substantial issue, the court ordered the students reinstated temporarily while the university gave "consideration" to granting them a hearing.

Writing two years before the Court of Appeals decision in this case, one commentator noted that "today, as an increasing number of universities participate in government subsidies, they, as well as other schools officially established as state universities, become amenable to the Fourteenth Amendment. Correspondingly, the prospect for the protection of student academic freedom through constitutional litigation increases." In a footnote he cites some of the authorities on instances of acceptance of governmental benefits and public functions which constitute "state action," subjecting the organization to the due process and equal protection clauses of the Fourteenth Amendment.[44]

Support for this concept was evidenced in a 1969 state court decision involving a Boston University student expelled for allegedly cheating on a biology examination.[45] In ruling that the expulsion was "neither fair nor just" because the student had not been granted the requirements of due process, the Massachusetts court held that the principle of due process was applicable to private institutions. Other recent decisions,[46] however, do not reflect this view and there is no clear indication, at this time, that the courts are prepared to rule that students in private educational institutions are entitled to the same constitutional protection as students attending state-supported institutions.

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[43]*See Note 4*, supra.

[44]*See Note 3*, supra, *Van Alstyne.*

[45]Sturm *v.* Trustees of Boston University, *Equity No. 89433 (Sup. Ct., Suffolk County, April 18, 1969).*

[46]Powe *v.* Miles, *407 F. 2d 73 (2d Civ., 1968)* [*held that administrators at Alfred University, an upstate New York private institution, need not follow First and Fourteenth Amendment standards when imposing discipline*]; Browns *v.* Mitchell, *409 F. 2d 593 (10th Cir. 1969);* Torres *v.* Puerto Rico Junior College, *298 F. Supp. 458 (D. Puerto Rico, 1969).*

Conclusion

Constitutional law regarding student rights is now in a rapid state of flux. Certain of the principles mentioned above have only recently become routinely accepted. It will be wise, therefore, in the near future not only to keep one moistened finger on the pages of precedent, but to keep another pointed toward the strong winds of change.

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APPENDIX B

Constitutional Amendments Relevant to Standards of Academic Freedom

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Fourth Amendment

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a

speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defense.

Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Eighth Amendment

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Ninth Amendment

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The foregoing amendments are part of the Bill of Rights, passed by Congress on September 25, 1789, and ratified by the States on December 15, 1791. The amendment which follows is not part of the Bill of Rights. It was drawn up after the Civil War and declared to have been ratified on July 28, 1868 in a proclamation by the Secretary of State.

Fourteenth Amendment

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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